SUPREME COURT OF QUEENSLAND

CITATION:	*Jamieson v Vox Retail Group Ltd* [2002] QCA 220
PARTIES:	**IAN ARCHIBALD JAMIESON** (plaintiff/appellant) **v** **VOX RETAIL GROUP LTD** ACN 006 388 594 (defendant/respondent)
FILE NO/S:	Appeal No. 10974 of 2001 SC No 10037 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2002
JUDGES:	McMurdo P, McPherson JA and Mackenzie J
ORDERS:	**Appeal dismissed. Appellant to pay respondent's costs of and incidental to the appeal.**
CATCHWORDS:	TRADE AND COMMERCE - TRADE AND COMMERCE GENERALLY - STATUTES RELATING TO MISLEADING OR DECEPTIVE CONDUCT IN TRADE - OTHER STATES/TERRITORIES – where appellant an employee of respondent – appellant became member of respondent's superannuation fund – where appellant resigned due to ill health - where discussion about whether financial assistance might be continued - whether respondent's officer told appellant that he would be ineligible for an entitlement under the fund – whether misleading and deceptive – whether appellant relied on this statement TORTS - NEGLIGENCE – WHERE ECONOMIC LOSS/FINANCIAL LOSS - CARELESS ADVICE STATEMENTS AND NON-DISCLOSURE - PARTICULAR PARTIES AND SITUATIONS - OTHER CASES - where respondent's officer had expertise and resources to advise competently - whether officer gave advice to appellant – whether appellant relied on advice – whether negligent misstatement resulting in economic loss

COUNSEL:	G R Mullins for the appellant
	G C Martin SC for the respondent
SOLICITORS:	MacGillivrays Solicitors for the appellant
	Clayton Utz for the respondent

[1] **McMURDO P:** I agree with Mackenzie J that, for the reasons he gives, the appeal should be dismissed with costs to be assessed.

[2] **McPHERSON JA:** I agree with the reasons of Mackenzie J, which I have had the advantage of reading. The appeal should be dismissed with costs.

[3] **MACKENZIE J:** This is an appeal against the decision of a judge of the Trial Division dismissing the plaintiff's action against the respondent, his employer, for negligence and/or misleading or deceptive conduct under the *Trade Practices Act* 1974 (Cth). Claims for breach of contract and pursuant to the *Fair Trading Act* 1989 (Qld) were expressly abandoned in the written submissions at trial. There is passing reference to the *Fair Trading Act* in the learned trial judge's reasons, but only in the context of saying that, because of his primary findings, it was unnecessary to deal with it. The reference to it in the notice of appeal merely controverts that statement. No argument was addressed to the Act before us.

[4] The appellant had been employed as a marketing manager by the respondent. On 10 November 1992 he was approached by a member of the administration staff and asked to fill out a form entitled "Application for Membership of the Vox Group Executive Superannuation Fund". He gave evidence that he was very busy at the time and signed it without paying much attention to its meaning or the entitlements conferred upon him by it. He was not interested in contributing part of his salary to it because he had a pre-existing personal superannuation fund through a different insurer. There was evidence that, under a system in operation, he should have received documents relating to the Fund after joining it. He said that he did not. The learned trial judge made no finding of fact on the matter.

[5] On 29 January 1993 he suffered severe abdominal pains, unassociated with his work, and was admitted to hospital where he was operated on. He was discharged from hospital on 28 March 1993 and returned to work on approximately 14 April 1993. He ceased employment with the company on 21 May 1993, having tendered his resignation in writing, for health reasons. By this time he had exhausted his sick leave and accrued recreation leave, but was still being paid the equivalent of his salary on the basis that he "would be able to make that up down the track".

[6] One of the odd features of the case is that the appellant had forgotten about the application he had signed in connection with the Vox Group Superannuation Fund. Under the policy relating to the Fund he would have been entitled to payment for total disability which was, in effect, disability resulting from injury or sickness as a result of which the insured employee was unable to perform any of the important duties of his occupation and remained under regular medical care and attendance. It was not disputed that the appellant would have been entitled to claim under this policy on an ongoing basis, since he remained in a state of ill health. It is also apparent that it would not have been detrimental to the defendant's interests to reveal the nature of the entitlement to the appellant. These two circumstances in combination have led to unfortunate consequences, but unless analysis of the issues

leads to the conclusion that the decision below was erroneous, nothing can be done to retrieve the appellant's situation.

[7] At some time after tendering his resignation but before finishing work he spoke to Mr Wayne Reid, the General Manager who was based in Perth but visited Queensland on a regular basis. The appellant's evidence was as follows:

> "Wayne Reid came in to see me some days later and said to me that he believed - 'I understand you're leaving us', and I said, 'Yeah, that's correct.' He said, 'We can't change your mind?' or something similar to that. I said, 'Look, unfortunately I can't.' I showed him my wound and I said, 'I just can't go on like this and I wish I could stay because it's the hardest decision I have ever had to make and I am going to lose my house out of this as it is.'
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> What did Reid say to you?-- He said, 'Look' - you know, basically they would be able - they would be prepared to carry me through for a short period - for a period of time and that. I said, you know, 'It's just no good, Wayne. I've got to go. I can't see me getting better for a long time', and he said to me, 'Well, let's see if we can - if you're eligible, if we can organise some disability payments or entitlements of some kind and help you out, hey', and I said, 'Thank you very much', and he shook my hand and left."

[8] Mr Reid said that he had no recollection of such a conversation and did not believe that it took place. The learned trial judge found in this regard: "There is some doubt that the conversation with Reid ever occurred, but I am prepared to accept that it did."

[9] In the appellant's cross-examination, the following was said about the conversation:

> "Now, when you say Mr Reid came to speak to you-----?-- Yes.
>
> ----- he didn't talk about the superannuation fund, did he?-- No, he did not.
>
> And he didn't talk about any insurance policy, did he?-- No, he did not.
>
> …
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> When Mr Reid spoke to you you say that he said something to the effect of he would see if he could organise something on disability or entitlements?-- See if I was - yes, see if there was any benefit - disability entitlements.
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> There was no mention, was there, of any insurance policy?-- No.
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> You didn't at the time know of any insurance policy did you?-- No.
>
> So that it would have been your belief, wouldn't it that he was talking about whether or not Vox, the company, could come up with any more money?-- Or anything from anywhere, just see if I was eligible for any entitlements. I didn't restrict it specifically. Other

> than the words he said, I don't - I can't honestly say what I would have got."

[10] The plaintiff said that he did not hear further from Mr Reid but the next day or soon after he received a telephone call from Mr Bill Bromilow, the company's Human Resources Manager based at Macgregor, in the following terms:

> "Bill basically said, 'Hi, Ian. Wayne Reid's asked me to give you a ring. I understand that, you know, you're leaving us and sorry to hear about the situation.' He then said, 'Look, unfortunately you're not eligible for any entitlements or disability payments or anything of that nature. He said, 'I'm sorry, we are unable to help you out on this matter but if I can do anything for you on a personal level, please just let me know."

Mr Bromilow had no recollection of the conversation occurring. By chance, a supplier who was discussing orders for furniture and bedding, Mr Saunders, was with the appellant when it occurred, and had some recollection of it. He agreed that he did not recall superannuation being mentioned. The learned trial judge accepted the plaintiff's evidence that the conversation had occurred.

[11] In the appellant's cross- examination, the following passage appears:

> "Now, Mr Jamieson, I have to put to you that you are mistaken about the conversation you had on the telephone with Mr Bromilow and I put to you that he did not say anything to you along the lines that you were not entitled to salary continuance benefits?-- He certainly didn't - I don't believe he used the words "salary continuance benefits", but he certainly did tell me that I was not entitled to - there was no entitlements or disability payments. He never - I am sorry if I have misled you, but he never actually mentioned the words salary continuance payments to me on the phone.
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> You don't say, do you, that he spoke about an insurance policy, did he?-- He only mentioned entitlements or disability benefits. I didn't know whether it was a personal thing that Vox had or it was an insurance policy or - they were the words, sir. I basically thought that there was no entitlements or any benefits, I was not eligible for anything in relation to Vox.
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> After what you say was said, there was nothing stopping you, though, making any further inquiries, was there?-- To whom, sir?
>
> To anyone at Vox, anyone else?-- Nothing stopping me, no."

[12] The appellant remained in ignorance of the possibility that he may have a claim under the policy until December 1998 when he was watching a television programme and saw an item on superannuation which caused him to wonder whether he might have a possible entitlement to disability payments. After some difficulty was encountered in getting information, he made a claim and began to receive disablement benefits from about 8 June 1999. However, because of the terms of the policy he was unable to claim entitlements which would otherwise have been paid between 21 May 1993 and 8 June 1999.

[13] The action is based on the premise that what Mr Bromilow said to him was a contravention of s 52 of the *Trade Practices Act* in that it was misleading or deceptive, or that it was a negligent misstatement. The relevant findings of the learned trial judge are the following:

> "I find that at this time the plaintiff had not remembered signing the application to join the Vox Superannuation Fund back in November 1992. His mind was not directed to any insurance or other benefits which may have been available under that fund. Nor did he ever seek to find out before the alleged conversations with Reid and Bromilow. There is some doubt that the conversation with Reid ever occurred, but I am prepared to accept that it did. However it seems to me that what the conversations bore out was that the plaintiff was being informed by Bromilow that the company was not able to assist him any further. There was no representation made, and I so find, with respect to any entitlements the plaintiff may have had under the Vox Superannuation Fund. In my view the context of the conversations between the plaintiff, Reid and Bomilow was with respect to the prospect of the defendant paying *ex gratia* so to speak, payments out of its own pocket in order to assist the plaintiff during any period of recuperation or, perhaps in an endeavour to encourage him to remain at work. This is particularly so in the case of the plaintiff's alleged conversation with Reid.
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> It was submitted on behalf of the plaintiff that Bromilow, as Human Resources Manager, knowing that the plaintiff had been sick and knowing that he was leaving the employment with Vox because of ill health, must have assumed that benefits of different kinds had been paid to him during his period of ill health, including sickness benefits, holiday leave and, ultimately, *ex gratia* payments. The submission goes that some of these benefits were available from the defendant, and the disability benefits were available from the Vox Superannuation Fund. That may well be so but, as I found, the context of the conversation was solely with respect to any payments that the defendant was prepared to make to the plaintiff, not with respect to any benefits which may have become, or would become, available under the Vox Superannuation Fund.
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> I find that the plaintiff's memory was jogged by the television program in 1998 and that this caused him to look back to the provisions of the Vox Superannuation Fund, for the first time recalling that he had signed and entered that Fund in November 1992. The request made by the plaintiff was a very broad one and extracted a broad reply from Reid. There is, with respect to the argument, nothing to suggest that Bromilow knew that the plaintiff was looking for some source of funds or disability benefits to 'replace' his wages into the future other than from the defendant.
>
> It follows then that there was no statement made by anyone on the part of the defendant which could be considered misleading or deceptive in the circumstances. In the context of what he was being

> asked Bromilow gave a truthful and accurate answer to the question or enquiry posed by the plaintiff."

[14] Although the trial judge refers to a "request made by the plaintiff" and to the "question or enquiry posed by the plaintiff", the evidence quoted in para [5] shows that the subject was raised by Mr Reid, not the plaintiff. A more accurate description would be that there was a conversation in which future payments to the appellant was raised, following which Mr Reid spoke to Mr Bromilow about the subject.

[15] Mr Bromilow's evidence was to the effect that, while he did not recall the conversation, his practice was to refer inquiries concerning superannuation to the administrator or secretary of the Fund. It is a reasonable assumption, from the sequence of events, that Mr Reid asked Mr Bromilow a question about the possibility of further payments to the appellant. Acceptance by the appellant that no mention was made of superannuation in the conversation and the fact that there was no reason for Mr Bromilow to conceal information about the possible availability of disability payments from the Fund suggests that, subjectively, Mr Bromilow did not intend what he said to relate to anything but the kind of inquiry which the learned trial judge found. There was no evidence of what Mr Reid said to Mr Bromilow, in the absence of any recollection by either of them about the matter.

[16] From the perspective of the appellant, he did not have it in mind at the time that there might be payments due to him from the Fund or any other source. It is therefore difficult to accept that he did not pursue the issue of disability payments from it because he relied on the statement by Mr Bromilow as an assertion that he could get no payment from it. The learned trial judge had the opportunity to assess the witnesses as they gave evidence. In a case of this kind, such an advantage is real. There is no reason to think that it was misused by him. (*Devries v Australian National Railways Commission* (1993) 177 CLR 472). It was open to him to find that, in the context in which the conversations occurred, they were to be construed as concerning continued payments from the respondent only and that they did not relate to whether the Fund might be a source of such payments. No reason for setting aside the learned trial judge's finding has been demonstrated.

[17] Dealing first with the claim under the *Trade Practices Act*, the appellant's argument was that a reasonable person hearing the words spoken by Mr Bromilow would have taken them to mean that he had no entitlement from the respondent or any other source linked to his employment by it. They were either a misleading positive statement that there were no such entitlements or a statement that was misleading because of silence as to a possible source of them. Mr Bromilow's failure to distinguish between the two categories had the consequence that the statement was misleading.

[18] The difficulty with the arguments is that the learned trial judge effectively found that the context of the conversations did not support the conclusion that any of the participants thought they were addressing anything more than the question whether the appellant could be assisted by the respondent in some way notwithstanding that he had exhausted his leave entitlements. At that time, the appellant had no belief or expectation that he had any prospects of payment from any source external to the respondent. He had forgotten about the Fund and there was no evidence that he had

ever adverted to what the Fund entitled him to claim in the circumstances in which he found himself.

[19] In light of the learned trial judge's findings, the fundamental premise of the appellant's argument is not made out and the dependent argument that reliance on Mr Bromilow's statement on behalf of the respondent effectively precluded him from making a claim against the Fund within the limitation period also fails.

[20] With regard to negligence, the case is pleaded as one of negligent statement causing economic loss. The framework of the case was that the appellant discussed with Mr Reid the prospect of a disability payment being made to him and was told by Mr Reid that the prospect of such a payment would be investigated. He was subsequently informed by Mr Bromilow that he was ineligible for any disability payments and that there was nothing available to him. It was alleged that Mr Bromilow, who was in charge of the respondent's personnel department which handled employees' claims for a range of entitlements, had spoken to Mr Reid and/or assumed responsibility for investigating whether the appellant was entitled to any disability benefits. Mr Bromilow, who had the expertise and resources to advise competently and accurately on those claims, knew or ought to have known that the appellant would rely on his advice. It was alleged that the appellant relied on Mr Bromilow's advice because of his position and his expertise and resources to advise competently and accurately, and in reliance on it, did not investigate the prospect of making a claim or make a claim on the Fund.

[21] The finding of the learned trial judge as to the context of the conversations is fatal to this cause of action as well. It is a necessary implication from the finding that the appellant was not asking for advice concerning any rights from any source he might be able to access, and that Mr Bromilow was not purporting to advise about payments other than those which the respondent itself might make. The finding leaves no room for the notion that Mr Bromilow knew or ought to have known that the appellant was relying on his skill and expertise to advise him in the way alleged. A similar difficulty with regard to reliance to that discussed in connection with the *Trade Practices Act* claim exists in relation to this cause of action as well.

[22] Since the plaintiff's appeal fails at the threshold in relation to each cause of action, it is not necessary to elaborate on other arguments raised by the respondent in support of the conclusion that the appeal must fail. The appeal should be dismissed. The appellant should be ordered to pay the respondent's costs of and incidental to the appeal to be assessed.